1980

Comments on Some Policies Underlying the Constitutional Law of Religious Freedom

J.Morris Clark

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I want to talk with you today about an overview of the constitutional law of free exercise of religion and establishment of religion. I am not highly concerned with going over in detail the many cases that the Supreme Court has decided and giving to you exactly what they have said. I am more concerned with trying to talk a little about the policies behind the Supreme Court's decisions. We may agree or disagree with them, but it is important to have a feel not just for what the cases have said but also for what the policies are that formed those decisions, and then to be able to deal with those policies on their own terms.

One must keep in mind always, in dealing with the first amendment, that there are two potentially conflicting principles contained in its clauses on religion. One clause says the states shall not prevent the free exercise of religion. The other clause prohibits any "establishment" of religion by the state. These two provisions are in conflict because on the one hand it is unconstitutional for the state to discriminate against religious groups or people by excluding them from privileges and benefits that other groups in society get, but at the same time the Court has indicated it is unconstitutional for the state to participate in religion or to aid it.

There are many situations in which the state has given a benefit to the society at large, for example, school books, busing, or the use of public facilities. The question then arises whether it is unconstitutional on the one hand to exclude religious people or groups from these benefits or whether on the other hand it is unconstitutional to let them participate. It is kind of a "betwixt and between" problem that the Court has struggled with and perhaps not articulated very well.

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† Address delivered at a meeting of the Center for Law and Religious Freedom, a ministry of the Christian Legal Society, at Williamsburg, Virginia, April 2, 1977.

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I want to talk to you about that problem at a rather theoretical level to try to see not just what the Court has said but also what seems to make sense in terms of general principles in this area. I think it's particularly important that Christian lawyers be concerned about making sense of this conflict between the free exercise of religion and its establishment. It is clearly important from a Christian point of view that a court should in a given case reach results that do not harm God's work. Yet it is equally important that the law be fair, well articulated in principle, and sensible. What is sauce for the goose must be sauce for the gander in this area. What law applies to us as Christians applies to our Jewish neighbors, Muslim neighbors, and atheist neighbors as well. It is also important that in getting the rights that we want, we be able to explain clearly and articulately to those neighbors, who are people we are duty bound to love, why our position makes sense in terms of the Constitution.

Let's embark on that a bit. I think that a good starting place is the well-known (at least in this group) case of the Christian student groups who want to use public high school or college facilities. This case raises clearly the conflict that I have just alluded to: on the one hand, is it unconstitutional to keep student groups from using public school facilities with other nonreligious student groups just because they are religious—thus discriminating against religion—or, on the other hand, is it unconstitutional to permit such use because in some way the state is aiding religion by giving religious groups a meeting place in public facilities?

Now I would like to back off a little bit and look at some of the case law in very general terms and some of the explanations that the Court has given of the tests that it uses in this area. In some cases the Court has said, or at least implied, that aid to religion is almost per se a bad thing. For example, the Court has said that it is unconstitutional for religious teachers to come into the public schools to teach.[1] The Court will not allow the public schools to be a vehicle for religious instruction, even though secular instruction of any other kind is clearly permitted there. Similarly, aid to parochial schools is unconstitutional because it aids religion.[2]

1. *See* Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203, 210 (1948).

2. *See, e.g.*, Everson v. Board of Educ., 330 U.S. 1, 15-16 (1947). *See also* Roemer v. Board of Pub. Works, 426 U.S. 736, 747 (1976); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 779-80, 783-85 (1973); Levitt v. Committee for Pub. Educ. & Religious Liberty, 413 U.S. 472, 481-82 (1973);

On the other hand, the Court has indicated that certain kinds of nondiscriminatory aid to religion are permissible. School book loans to students who attend parochial schools,[3] busing of such students,[4] and tax exemptions for religious organizations[5] have been upheld.

What rationale has the Court announced to explain these kinds of distinctions? I think there are primarily four explanations that the Court has given. I have problems with all four of them because I don't think they really explain and distinguish the cases the Court has decided.

First, the Court will say on occasion that the test is whether the benefit in question is going to the child as an individual or whether the benefit is going to religion as such. *Everson v. Board of Education*,[6] which upheld school busing, used that rationale: school busing benefits the child; therefore the aid is secular and educational rather than religious.[7] It doesn't matter whether the child is going to a religious school or a public school—the benefit runs not to the school or institution or religious group but to the child himself. However, there are problems with this reasoning. For example, tax deductions to parents for costs of private elementary and secondary education have been held unconstitutional.[8] Likewise, funding teachers' salaries[9] and the maintenance and repair of facilities[10] in religious schools have been held unconstitutional. Why? Why aren't these benefits that go to the child just as school busing does? Why are school books any different from other school facilities? The Court might respond that in some cases one can individualize the product, so that in a chemistry class it would be permissible to give the child individually a beaker, but one could not give the child a spectrometer as that has to be used

Lemon v. Kurtzman, 403 U.S. 602, 621-22 (1971). *But cf.* Committee For Pub. Educ. & Religious Liberty v. Regan, 48 U.S.L.W. 4168 (1980) (upholding New York statute involving reimbursement to nonpublic schools for reporting attendance and grading state-prepared tests).

3. *See* Wolman v. Walter, 433 U.S. 229, 237-38 (1977); Meek v. Pittenger, 421 U.S. 349, 362 (1975); Board of Educ. v. Allen, 392 U.S. 236, 248 (1968).

4. *See* Everson v. Board of Educ., 330 U.S. 1, 17 (1947).

5. *See* Walz v. Tax Comm'n, 397 U.S. 664, 680 (1970).

6. 330 U.S. 1 (1947).

7. *See id.* at 16-18.

8. *See* Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 789-94 (1973).

9. *See* Lemon v. Kurtzman, 403 U.S. 602, 606-07 (1971).

10. *See* Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 774-80 (1973). *But cf.* Tilton v. Richardson, 403 U.S. 672, 689 (1971) (holding constitutional that portion of a federal act that authorized construction grants and loans to colleges and universities, including church-related institutions).

by more than one child. Is that the distinction? In functional terms, I don't think that it makes a great deal of sense. Educationally, those pieces of equipment serve the same purpose whether or not you can break them down into individual units. And even school buses after all haul more than one child. I think that analyzing any of these cases in terms of benefit to the student fails to distinguish them.

Secondly, the cases attempt to make a distinction between the religious and nonreligious uses of the particular kind of benefit. *Board of Education v. Allen*[11] and *Tilton v. Richardson*[12] talk about that distinction. There is a problem with it, however, because it is difficult to say when benefits from the state that help religious schools in religious instruction of some kind do or don't advance religion. Take the relatively easy case of school busing. If you allow parochial school students to have school busing at the expense of the state, it means that the parochial school doesn't have to provide that service, and the money can go instead to whatever other religious purpose the school wants to serve. The same, I suppose, is true of textbooks even if those textbooks deal with secular subjects. They free money at the very least for religious uses. There is another problem, too, in that almost any subject of instruction, such as science, history, or music, can be taught (and many people think should be taught) with religious overtones. It probably cannot be said that there is such a thing as a completely secular subject in a religious school. If one meant to learn to play the music of Bach and play it nonreligiously, what does that mean? Consequently, I find the distinction between secular and religious subjects of aid to be ultimately unsatisfying.

Another distinction the Court talks about is equality of treatment. If the state is treating religious groups the same as other groups, then it is not violating the establishment clause. That, for example, is what the Court said in the case of *Walz v. Tax Commission*,[13] a case that upheld the propriety of tax exemptions for religious organizations including churches. The state is not helping religion after all because not just religion gets these tax benefits. Rather, the benefits accrue to any nonprofit group in the society, whether it is educational, scientific, or whatever. Hence the state is not singling out religion. This

11. 392 U.S. 236, 244-48 (1968).
12. 403 U.S. 672, 679-81 (1971).
13. 397 U.S. 664, 672-73, 680 (1970).

same assertion, of course, is generally true of fire and police protection for churches, and of the busing of parochial school students in the *Everson* case.[14] The state is treating religious groups the same as all other "similar" secular groups.

I think this theory explains a lot but it doesn't explain everything. It doesn't explain why it is that in a public school one may not teach the teachings of Jesus if one also teaches the messages of other religious leaders and religious philosophers.[15] In other words, the theory of equality doesn't explain why one can't teach religion if one presents the alternative points of view as well. The theory doesn't explain why the state can't fund private parochial schools in the same way that the state funds public education.[16] For that matter, the theory doesn't explain why the state can't fund religious private schools if the state also funds secular private schools.[17] There are limitations to this notion of equality. By alluding to this equality priniciple, the Supreme Court hasn't explained why it applies it in one case and not in another.

Fourth, the Court has developed a kind of summary test that really incorporates the three preceding tests. The Court first announced this formula in *Abington School District v. Schempp*,[18] in which it said that a law is constitutional if it has "a secular legislative purpose and a primary effect that neither advances nor inhibits religion."[19] In addition, as the Court stated in the *Walz* case, a constitutional law does not create "an excessive government entanglement with religion."[20] That's all well and good as a conclusion about a law that the Court will uphold, but I suggest it is really a nontest. You can apply those conclusions to almost any law, but it doesn't serve to test a law that serves a religious purpose by helping a parochial school through busing, for example, but that also serves a secular purpose in getting students educated. You can put the conclusion on such a law that it does or does not benefit religion and that's its purpose, but how does a court decide that?

14. Everson v. Board of Educ., 330 U.S. 1, 16-18 (1947). *See* text accompanying note 6 *supra*.

15. *See* Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203, 210 (1948).

16. *See* cases cited in note 2 *supra*.

17. *See* Sloan v. Lemon, 413 U.S. 825, 834 (1973) (dictum).

18. 374 U.S. 203 (1963).

19. *Id.* at 222.

20. Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970). The tests announced in the *Schempp* and *Walz* cases have been combined into a three-prong test used by the Court in subsequent establishment clause cases. *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

What is the functional test that tells us whether the purpose and effect are predominantly religious or secular? This "test" doesn't tell us much of anything about how it should be applied.

Let's step back from the Court's announced tests and language and see if we can figure out what the policies are or should be in terms of the values, the really important things, that we are trying to safeguard. When I teach this subject in law school, I generally use two hypotheticals and I will use them at this point and talk a little bit about them. First, what is wrong with the public school's teaching religion so long as it teaches all religions and also areligious or even antireligious philosophies? What's wrong if the state has a participatory class—I don't mean just an academic class—for Christians, Jews, Muslims, Humanists, Buddhists, and Nihilists to talk about values or, indeed, the lack of values? A student could go to a class that attacks the very existence of values—what's wrong with that? I think if we go back historically, the framers of the Constitution might have said there is nothing wrong with that. The establishment clause was probably originally seen as a means of preventing the state from favoring one religion at the cost of others, principally by setting up a church affiliated with and sponsored by the state. The establishment clause was probably drafted, in other words, to prevent the lack of even-handedness among religions. But that limited purpose is not sufficient any longer, for the Court has clearly said that the state cannot permit Bible reading,[21] prayer,[22] or religious instruction[23] in the public schools. I personally think those are good decisions, although some of you may disagree with that conclusion. Here are some of the policies that I think explain where the Court is coming from on this issue.

There are several problems that arise when the state gets into the business of religion, even when it is trying to be even-handed about it. In the first place, there is the problem of coercion alluded to by the Court in several cases.[24] The coercion does not come from school, because it is not telling any students in my hypothetical what courses to take in this area, but rather coercion may come from the students' peers, at least in elementary and secondary schools. We would be asking stu-

21. *See* Abington School Dist. v. Schempp, 374 U.S. 203, 205 (1963).
22. *See* Engel v. Vitale, 370 U.S. 421, 424 (1962).
23. *See* Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203, 210 (1948).
24. *See* Sherbert v. Verner, 374 U.S. 398, 404 (1963); Torcaso v. Watkins, 367 U.S. 488, 495-96 (1961); Zorach v. Clauson, 343 U.S. 306, 311 (1952).

dents to stand up and be counted according to their religious faith, and that's very threatening, particularly for members of minority religions. If you are the only Jewish child in a school where everybody else is at least nominally Christian or at least non-Jewish, it doesn't take a great deal of empathy to understand the fear of persecution or anti-Semitism which that student would harbor if asked to declare himself.

Second, there is a serious problem of ensuring actual even-handedness in that context. When the state forces religion to the surface, there is always the danger that teachers will in fact be biased—at least there is that legitimate fear with regard to minority individuals. If they are biased, it may carry over to the way the student is treated in the rest of his academic affairs. Bias may also affect the way in which those religious classes are taught, especially if the person assigned to teach them is not terribly sympathetic toward the group to which he is giving instruction.

Third, I think there is a problem of lack of even-handedness in the allotment of funds for supporting instructional materials, such as films, projectors, and educational materials, depending on whether that class is in the majority or minority religion.

Fourth, there may be a real problem in achieving true parity in the educational or religious experience between the majority and minority groups simply because it is very difficult to have the same kind of Hanukkah celebration if you are the only Jewish child in school, having it all by yourself, compared with a Christmas celebration where you have 150 other children participating with you. By the very dynamics of numbers, there will be a disparity in the quality of the experience.

I think these are some of the reasons why the Court has felt it's bad for the state to get involved, at least in elementary and secondary schools, in "doing" religion itself. Along with those problems of even-handedness, the Court has perhaps felt that the state's participation in religion will generate a debate in the public forum that can be acrimonious and can start serious religious conflict. Whenever there is a question whether my child is getting treated differently from your child for religious reasons, that question becomes a volatile issue in the school board, in the legislature, or in whatever public forum is available. I think that the Court is concerned that we not become religiously inflamed over those kinds of issues.

In trying to set forth these arguments, I do not mean to say

that they are absolutely or necessarily persuasive. I would guess that some would disagree with me on the issue of whether the limitations that the Court has imposed on religious instruction and worship in public schools are desirable; I think there is room for disagreement among Christians in that kind of ultimate judgment. But I think it is important to keep the arguments in mind because we will have to respond to them, even if we wish to try to get the Court to change its position. We have to keep in mind where the Court is coming from and what the arguments on the other side are, if any one of us wants to arrive at a solution more agreeable to his own particular beliefs.

The policies above are some of those the Court is trying to serve when it says the state can't "do" religion. We still have to confront the question: When *is* the state "doing" religion? It is clear from case law that when the state hires the teachers that run the Bible study in the public schools, then the state is itself engaged in religious activity.[25] It is also clear that the school may not allow its facilities to be used for religious instruction by outsiders during regular school hours.[26] However, it is much less clear whether the state is "doing" religion when the state merely permits school rooms to be used by a private group after school hours or before them.[27] It is also less clear whether the state is itself engaged in religion when the state gives money to parents for private education, which may or may not be religious, according to parental choice.[28] There is clearly a value, is there not, to pluralism in this society—to letting individuals "do their own thing" in practically every area of life. The value of pluralism becomes a constitutional privilege when one is dealing with the free exercise of religion. It is not only not bad to allow religious pluralism, but it is constitutionally required in some way to allow such pluralism. Here's where the real "crunch" comes between the establishment clause and the free exercise clause.

Now let me turn to the second of the two hypotheticals I want to discuss with you. What is the real problem with giving money to parochial education or, for that matter, allowing tax deductions to parents who are going to send their children to

25. *See* Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203 (1948). *See also* Lemon v. Kurtzman, 403 U.S. 602 (1971).

26. *See* Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203 (1948).

27. *Compare id. with* Zorach v. Clauson, 343 U.S. 306 (1952).

28. *See, e.g.*, Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 782 n.38 (1973).

parochial schools? Where is the Court coming from in this area? I want to talk about four major policies that I think the Court necessarily looks to in trying to decide whether, when the state gives monetary or other benefits to a private group, it is or is not establishing religion or, on the other hand, prohibiting the free exercise of it. The first of those policies is the extent to which religion is either the sole or primary beneficiary of that given law. It is not the only element that the Court looks to, but I think it is clearly an important one. For example, when private secondary schools were being aided in Pennsylvania, the Court made it clear that one of the problems with aiding private secondary education was that most of the private schools that would be benefited were religious.[29] By contrast, that fact did not exist when the Court dealt with aid to private colleges and universities.[30] It is permissible, for example, to give scholarships to college students even though some of the students will choose to attend religious schools. Why?—because the purpose of the law was not primarily aimed at benefiting a religious group. The majority of those scholarship recipients would not be using that money for religious education. This same principle also appears to be important in the tax exemption area.[31] Religious groups are not numerically the groups that benefit most from the exemption for charitable organizations. There are all kinds of other charitable organizations in addition to religious ones—educational, scientific, literary, and fraternal. Religious groups are probably substantially less than fifty percent of all the different kinds of charitable organizations that benefit. That numerical percentage, I think, is critical in the Court's reasoning and tells us something about the reasons why parochial aid has been struck down in the elementary and secondary education area.

Secondly, I think the Court is concerned with the extent to which the religious benefit is traditional, on the one hand, or whether, on the other hand, granting the benefit changes the status quo apparently for the purpose of benefiting religion. Tax exemptions, as the Court made clear in the *Walz* case,[32] have traditionally been extended to religious groups as well as

29. *See* Meek v. Pittenger, 421 U.S. 349, 364 (1975); Lemon v. Kurtzman, 403 U.S. 602, 620-21 (1971).

30. *See* Roemer v. Maryland Pub. Works Bd., 426 U.S. 736 (1976); Hunt v. McNair, 413 U.S. 734 (1973); Tilton v. Richardson, 403 U.S. 672 (1971).

31. *See* Walz v. Tax Comm'n, 397 U.S. 664 (1970); notes 13, 20 *supra* and accompanying text.

32. *See* Walz v. Tax Comm'n, 397 U.S. 664, 672-73 (1970); text accompanying note 13 *supra*.

other charitable groups. The state is not changing anything by adding religion as a beneficiary to that group. The status quo already benefits religion. That is not true of course in the area of private elementary and secondary education aid. If the state is giving something to private religious schools (albeit as a subgroup of private schools generally), the state is usually doing something new. And where the primary beneficiaries of aid to private schools are religious schools, it looks like you are moving away from the status quo toward a different arrangement, primarily for religious reasons. In other words, it may be that there is nothing essentially wrong or discriminatory about giving every parent five hundred dollars per year and saying, "Go educate your child"—that's pluralism. There is no reason to say that that arrangement discriminates against anyone. It's fair and even-handed, yet I think the Court would say that it's a move away from a status quo of public education where everybody goes to the same school. Even though the state would be moving to something that looks fair and even-handed, the reason for the change would be characterized as an attempt to accommodate or benefit religion. The Court seems to say, "That's wrong."

I think this position of the Court is a very arguable position. I don't think that aid to private education has to be viewed as an establishment of religion. I think as long as the state is not being discriminatory and is not itself involved in "doing" religion, its actions could well be characterized as constitutional. The explanation of why the Court has nonetheless disfavored such aid, it seems to me, must have to do with its sense of a religious purpose or motivation behind that shift from the status quo.

There appears to me to be a third major purpose or motivation behind the Court's denial of even that kind of even-handed benefit—namely, the extent to which religious debate and division is going to be generated by the move. This debate is really part and parcel of moving to the new status quo for religious reasons, which we have just talked about. That move would necessarily entail religious debate in the legislature along religious lines—the allegations being made that you Christians are trying to get public funds for parochial education; you people are trying to get public funds for parochial education; you people are trying to pass this law to benefit religion. The Court may well feel that it does not want this dialogue to happen. Again I think that position is debatable. We argue over all kinds of inflammatory things in state legislatures, from Com-

munism to sex education. I don't know that religion is necessarily all that much more inflammatory or different. Yet I think that the Court would probably say if pressed that the prevention of religious debate in legislatures is an important part of the establishment clause's purpose, because the founders did think that religious differences were more inflammatory than others.

I would suggest a fourth policy as well behind the Court's decisions. This policy concerns the extent to which censorship and monitoring of the religious content of what's going on is required. To the extent that somebody is going to have to go and see whether some particular state benefits are being used for religious purposes as opposed to secular purposes, that's undesirable. To the extent that the state gives benefits to a group that's supposed to be secular and must keep checking up to see if they are doing something religious, that's bad. I think that fact goes far to explain why the Court has apparently drawn such a hard line in the area of aid to parochial education as it has.[33] It doesn't want to keep checking up on whether a given benefit is used secularly or religiously, because it looks an awful lot like censorship. So it will say that whenever a benefit could be used in an ambiguous way, such as for school buildings or teachers' salaries, we are simply not going to let it happen. We don't want to keep going back in there as the state and keep asking, "Are you talking religion or are you talking something else?" To Christians, that policy seems clearly defensible, for we don't like censorship any more and probably a good deal less than the state itself likes to have to engage in it.

Let's now go back to our hypothetical of the student group using the school after hours and ask how we apply these different factors to that case. First of all I think it is fairly clear that when a private group uses a school classroom after hours, the state itself is not "doing" religion. We don't have the situation in our first hypothetical where we said that we don't want the public school itself teaching religious subjects, for this is a private group, and the school is not accommodating the group within its normal study time. Admittedly, there might be a problem with coercion if the group is large enough. If two-thirds of the student body is involved in Bible study, the study starts looking pretty official at that point and may indeed be treated judicially as an official school activity. Such high attendance is obviously pretty unusual. As Christians, I am sure

33. *See* cases cited in note 2 *supra*.

we wish it were more usual! It is not, therefore, a legal factor that I think we have to worry about a great deal.

Second, it is generally true that religious groups that meet on school premises after or before hours are not the majority of the groups that use the facilities in that way. There are generally all kinds of private clubs and groups meeting, and this is not an accommodation primarily of religion if the school says that groups generally are allowed to use the classrooms.

Third, clearly the state is giving religious groups equal treatment with other groups in the hypothetical.

Fourth, it is traditional in many schools for private groups, including religious groups, to meet in this way. I doubt that, if one goes back a number of years, one would find any strenuous opposition to that kind of accommodation; so the state is not moving away from a status quo if it allows those groups to meet.

Last, I think there is no entanglement if the state permits religious groups to meet as other groups do—indeed I think the opposite. If a school said that the debate society can meet but not debate religious subjects, clearly the school is in a censorship position at that point, is it not? It must keep checking up on what these groups discuss, and that's abhorrent. Teachers cannot very well hang over the shoulders of students standing in the hallway to find out if they are talking about Jesus. That's contrary to all our notions of freedom of speech and assembly.

For all these reasons, it seems to me that the school meeting case clearly ought to be a winning case. If it's not a winning case, I suppose that would be because a fear of the debate would be engendered in the school, *i.e.*, a fear that the kind of potential animosity that might be generated between Christian and non-Christian students would disrupt the educational process. I think that's the strongest argument the students would have to worry about. In *Tinker v. Des Moines Independent Community School District*,[34] the Supreme Court has indicated that if the educational experience is being impaired by acrimony or disturbance that results from debate over ideas or demonstrations, then the school can stop the debate.[35] Yet that theory is difficult because it says if any group does not like another group enough, the first can stop the second group from meeting by simply being disruptive. It is not necessarily good constitu-

34. 393 U.S. 503 (1969).
35. *See id.* at 509; *id.* at 513 (dictum).

tional law to say that just because there is a disturbance of some sort, the activity can therefore be prevented.

We could talk about several other hypotheticals but, in view of the time remaining, I am not going to do that. In closing, there is another aspect of the free exercise of religion different from the requirement that the state treat religious groups even-handedly with the rest of society. You should keep in mind that there are situations in which the Court has said that, because of the free exercise clause, religious people and groups are constitutionally entitled to special benefits that the rest of society does not get. For example, courts have said that if an Amish Christian has a conscientious religious objection to doing certain things, such as sending his children to public school rather than an alternative religious school, the state must accommodate this religious belief.[36] The Amish school case and the conscientious objector selective service cases[37] are probably the best examples of that principle and certainly the most recent. It is at least likely (although not clear because there has always been a statute there) that the Court would decide that a conscientious objector need not serve in the armed forces. Clearly, it has interpreted that statute generously because of the underlying conscientious constitutional argument that one has a right not to go into the armed forces. There are other areas, such as refusal to do jury duty[38] and refusal to take blood transfusions,[39] in which lower courts have also granted a right of conscience.

I think it is probably different when one asserts a conscientious right not to do something that the state is trying to make him do, as opposed to asserting a conscientious right to do affirmatively something that is going to interfere with other people. I suppose, for example, that there is no constitutional right of conscience to operate a sound truck in a residential neighborhood at midnight because you feel compelled by conscience to do that. It seems that the courts are likely to draw the line between, on the one hand, assertions of conscience that keep people out of society so they can do their own thing and, on the

36. Wisconsin v. Yoder, 406 U.S. 205 (1972).

37. Welsh v. United States, 398 U.S. 333 (1970); United States v. Seeger, 380 U.S. 163 (1965).

38. *See* United States v. Hillyard, 52 F. Supp. 612 (E.D. Wash. 1943).

39. *See* Winters v. Miller, 446 F.2d 65 (2d Cir. 1971); Holmes v. Silver Cross Hosp., 340 F. Supp. 125, 130 (N.D. Ill. 1972) (dictum); *In re* Brooks, 32 Ill. 2d 361, 205 N.E.2d 435 (1965). *But see In re* President & Directors of Georgetown College, Inc., 331 F.2d 1000 (D.D.C.), *cert. denied*, 377 U.S. 978 (1964); John F. Kennedy Memorial Hosp. v. Heston, 58 N.J. 576, 279 A.2d 670 (1971).

other hand, affirmative conscientious assertions that interfere with other people's rights.

If there is any one closing thought that I would leave with you on this subject, it is this: Although it is clearly critical for us to serve the purposes of God in terms of the outcome of a given case in advancing the Gospel, I would urge it upon us to do so in a way that we conscientiously feel safeguards the rights not only of ourselves but of others, and that provides an articulate, informed explanation of why we stand up for the constitutional rights that we have.